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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re H.G., et al., Persons Coming Under the
Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

L.P.,

Defendant and Appellant.

F058591

(Super. Ct. Nos. JD121446,
JD121447, JD121448)

OPINION

APPEAL from an order of the Superior Court of Kern County. Robert Anspach,
Judge.

Shaylah Padgett-Weibel, under appointment by the Court of Appeal, for
Defendant and Appellant.

Theresa A. Goldner, County Counsel, and Judith M. Denny, Deputy County
Counsel, for Plaintiff and Respondent.

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This appeal arises from a contested dispositional hearing conducted pursuant to Welfare and Institutions Code section 361¹ at which the juvenile court removed L.P.'s daughters, H., C. and K. (collectively the girls), from her custody and ordered her to participate in reunification services. Mother challenges the sufficiency of the evidence to support the removal. We affirm the court's order.

FACTUAL AND PROCEDURAL HISTORIES

On June 19, 2009,² the Kern County Department of Human Services (Department) received a referral alleging emotional abuse perpetrated by mother and C.D., the presumed father of C. and K. (father). The day before, police officers were dispatched to the family's home regarding a report of domestic violence. Mother told police father, her husband of five years, scratched her and pushed her against the door, causing pain but no visible injury other than white marks on her legs. Mother said father scratched her right leg with his fingernails when he reached for the blanket she was holding. When mother walked to the kitchen to get her cellular telephone to call 911, father ran after her and pushed her in the stomach with his shoulder, which caused her to fall with her back against the kitchen door. While mother was on the phone with 911, father picked up the vacuum cleaner, held it over his head as if he were going to throw it at her, and then put the vacuum cleaner down and walked out of the kitchen. The girls were playing in a back bedroom at the time of the incident. Mother also told police there were several prior unreported domestic violence incidents between her and father, and that she would get a restraining order on her own.

Father told police he accidentally scratched mother when he grabbed at a sheet as she tried to pull it away from him. Father claimed mother provoked him to be violent, but he was not about to hit her. He said mother threw a slipper at him, which struck him

¹ All further statutory references are to the Welfare and Institutions Code.

² All dates are for the year 2009, unless otherwise stated.

in the stomach; she also threw a bunch of celery at him, which missed. Mother then reached for a stick and called 911. Father admitted getting the vacuum cleaner and raising it above his head, but said he put it down when he realized he was doing what mother wanted. The police arrested father and transported him to jail, where he was booked for spousal battery. On June 22, father was served with a restraining order while at the family's home.

On June 24, two social workers investigating the referral spoke with mother and the girls at their home. Mother said she and father fight over stupid things and insult each other, and she recently called the police because she was afraid the incident would escalate to a point where father would seriously hurt her. Mother said father had seriously hurt her on April 28, but she did not report it. On that occasion, she and father were arguing over something stupid when father brought up the fact that mother had two other children in foster care and she was not a good mother. Mother picked up a screwdriver and a stick out of anger to show father she was not afraid of him. Father got mad and asked if she was going to hit him. Mother said no, she just wanted to prove to him she did not fear him. Father charged her, put her in a headlock, and began pulling her hair out while she was lying on the floor. Mother tried not to scream or yell because she didn't want to scare the girls, but she guessed she must have screamed since the girls were standing at the window looking inside while father was beating her. The fight ended and father left. Mother stated the incident was her fault and she shouldn't have "approached him like that."

One of the social workers told mother they were aware of another incident of domestic violence that was reported in 2004. Mother's eyes filled with tears and she asked how they knew that. The social worker explained the Department's access to mother's prior history. The social worker thought father needed counseling due to his anger issues and was concerned that mother was blaming herself for the abuse. Mother

said she was interested in going to a women's shelter. The social worker agreed to return later that day to pick her and the girls up.

A social worker spoke with five-year-old C., who said father had hurt her, her sisters and mother. C. said father is mean because he pushed her while mother was in the bathroom and she smacked her head, which started to bleed. C. said father has called all of them the "b" word, which she said was "bitch." When asked what happens when father hurts mother, C. stated she screams and cries, and the girls hit father to make him stop. When asked if K. ever got hurt, C. said that once K. was messing with the blinds and father choked K. and pushed her into the window. C. did not know where mother was when that happened. Seven-year-old H. told the social worker she had seen father hurt mother. When that happens, H. and her sisters scream, cry and hit father to make him stop. H. said she had not seen her sisters get hurt, and that C. hit her head when she fell. H. said that the girls sleep in beds in K.'s room if they are not scared and with mother when they are scared. When asked what makes her scared, H. said she has bad dreams about mean dogs in her bedroom and C. dreams about spiders.

When the social workers returned later that day to take mother and the girls to a women's shelter, mother said she had made a very big mistake and wanted to know what would happen if she made contact with father despite the restraining order. Mother said father and his friends kept calling her saying she was a bad person and father was going to kill himself, and she broke down and let him come to the house the night before. Father had been asleep in the house when the social workers were there that morning and heard everything, including the social workers' plan to pick them up, and he was very upset, but he left and would not return. Mother said the day before, father had been acting weird by messing with the breaker box, accidentally shutting off the neighbor's power, and telling her that her brother-in-law had gone to prison for killing his girlfriend. Mother believed father was trying to shut the power off to scare her. The social worker transported mother and the girls to the shelter.

On July 1, a social worker contacted the domestic violence shelter and was informed mother had left the shelter. The social worker contacted law enforcement and asked if they could verify whether father was in the family's home. Police were dispatched to the family's residence at two a.m. on July 2. Mother answered the door; she denied that father was present, but allowed the officers to check the residence. An officer found father under the bed in the spare bedroom and arrested him for violation of a domestic violence restraining order.

Social workers spoke with father that day. Father said he violated the restraining order because he had nowhere to go since neither he nor mother had family or real friends in the area. He admitted overhearing what mother said about him when the social workers were at his home on June 24 and claimed mother was lying. Father said he had gone to stay at the mission, but mother called him because she needed him to watch the girls while she went to a doctor's appointment. Father admitted checking the breaker box to see which breakers went to their unit and that he had done it just to be malicious. Father claimed mother could not protect the girls like he could.

Father also admitted the last time he and mother got physically violent was on April 28. He claimed mother came up behind him with a stick and screw driver while he was playing a game, and they began "tussling over the stick;" he put mother in a headlock and began pulling her hair and hitting her in the head. Father said the girls were outside during the fight. Whenever he and mother begin fighting, they send the girls to their room or outside; they do try to look inside or come out of their rooms when their parents fight. Father denied that the girls hit him while he and mother fight, or that he called them names. Father said the girls are spanked, but otherwise neither father nor mother hits or abuses them. Father admitted that when he fights with mother he sometimes goes into a rage to the point that he does not recall what he did or was doing. Father said that as a child, he protected his own mother from domestic violence and he held a lot of anger inside because of it.

Social workers also spoke with the girls on July 2 before taking them into protective custody. C. said she was sad about father coming home because he is mean, makes mother cry and hits mother. H. said they left the house the social worker took them to because mother did not like the crying and screaming babies. While H. initially denied that father had spent the night with them the night before, she later admitted he had done so. H. said she lied because father was not supposed to stay there. H. was sad about father being home because he hurts mother and makes her cry. Three-year-old K. told the social worker she was mad that father was home and that mother made her mad when she and father go off and leave her at home to be watched by H. and C.

On July 6, mother admitted to a social worker that she wasn't thinking straight and was torn between her relationship and the girl's safety. Mother said she "didn't know what to do." Mother said the safe house was too far away from her home. Mother allowed father to live in their home while she was at the safe house, but she made him leave once she returned. When father could not find a place to stay, he came back to the family's house and she let him sleep there. Mother told the social worker about how father physically assaulted her earlier that year after she confronted him with a stick and screwdriver, and said he also hit her once right after they married. Mother said father had an anger problem and could be controlling, but they just verbally argued. Mother explained that she witnessed domestic violence in her home as a child and said she could benefit from domestic violence counseling. Mother denied any drug or alcohol use.

When the social worker asked what mother had done to provide a safe environment for the girls since their removal, mother said she served father with a reissued restraining order, packed up his belongings, put locks on the gate, bought a flashlight in case father turned the power off, requested a transfer through section eight, and made an appointment to take father off the lease. Mother stated there was no doubt she would call law enforcement if father returned to the home. Mother went to Haven

Counseling Center to enroll in counseling, but was unable to afford the cost. The social worker provided mother with other options.

The social worker spoke with father on July 6. He said that mother had a history of violence toward past boyfriends, and that four years ago, mother scratched him on his arm and face. He also said he accidentally hit H. once when he attempted to slap mother, and that mother continued to slap him on his face. Father reported using marijuana two to three times per week, but said he had not used since his arrest on June 18. Father said mother also smoked marijuana and they usually smoked together.

Mother's parental rights to two other children were terminated in September 2000. In that case, mother was arrested for child endangerment in January 1998 after leaving her two-year-old daughter alone for an unknown amount of time. Dependency jurisdiction was taken over the children and mother given reunification services, which were terminated in January 2000 due to her failure to maintain contact with the Los Angeles County Department of Children and Family Services and visit the children. The children were adopted in February 2002.

On July 7, the Department filed a petition alleging under section 300, subdivisions (b) and (j) that (1) mother placed the girls at substantial risk of suffering serious physical harm and emotional damage by her inability to protect them from physical violence perpetrated by father, as shown by the April 28 domestic violence incident and her repeatedly allowing father to return to the home, and her inability to provide regular care due to her use of controlled substances, as mother smoked marijuana on June 18 and had a documented history of marijuana use since 2004, and (2) the girls' half-siblings had been abused or neglected as defined in section 300, subdivision (b) and there is substantial risk the girls also would be abused and neglected. The petition in K.'s case contained additional allegations under section 300, subdivision (b), that there was a substantial risk of suffering serious physical harm and emotional damage as a result of physical violence perpetrated by father, as shown by his physical assault of mother on

April 28, and his arrest for violating the restraining order, and father's inability to provide regular care due to his use of controlled substances. The juvenile court ordered the girls detained. The girls were placed in foster care.

At the September 2 contested jurisdictional hearing, the Department submitted on the social workers' report. Mother and father both submitted the petition based on the social workers' report, but argued the court should not find true the allegations related to substance abuse under section 300, subdivision (b), and the allegation under section 300, subdivision (j), that the girls were at risk due to the previous dependency. The court, however, found all of the allegations true and that the girls were persons described by section 300, subdivisions (b) and (j).

In a report prepared for the dispositional hearing, the social worker stated that on July 30, father told the social worker he had enrolled in counseling for domestic violence as a perpetrator, and parenting and neglect classes effective July 28, and mother stated she was enrolled in domestic violence as a victim, although she was unsure of the enrollment date. Mother had not enrolled in parenting or neglect classes because she could not afford to pay the fees. The social worker advised mother that the adult school offered free parenting classes and referred her to the person heading the class. Mother tested positive for marijuana on August 12, at a level of 0.09uG/mL, and on August 31, at a level of 0.06uG/mL.

It was noted in a supplemental report that in April 2005, a social worker investigated a referral that alleged physical abuse and neglect. According to the referral, father slapped then three-year-old H. "so hard she flew in the air," and he and mother then had a physical fight. Mother and father admitted this occurred. H., who had a small mark under her left eye, said father hit her. The investigating social worker observed no signs of abuse or neglect to the children, and concluded the allegations were "unfounded."

Although the Department considered providing family maintenance services, it recommended family reunification services for both parents in light of mother's use of illegal controlled substances and domestic violence history. In a supplemental report, the social worker explained that while the parents had been compliant with their initial case plans — which included counseling for domestic violence as a victim for mother and as a perpetrator for father, child neglect and parent training — the parents' documented history of domestic violence dating back to 2005 demonstrated they had been unsuccessful in resolving the issue in the past and family maintenance services would not be appropriate at that time.

At the September 23 dispositional hearing, the parties stipulated that mother began a parenting class on July 24, which she would complete in November, and she had just started substance abuse counseling. The Department also accepted mother's offer of proof that she would testify she is no longer with father. When the court asked what contact mother had with father as of the hearing date, mother responded: "I speak with [father] on the phone. I did have my restraining order against my husband dropped for the reason being that, as his wife and as a person, that I am not completely innocent in the whole situation. Myself and my husband and I, we sit, and we have discussions, and we talk about our children's future. And I have stated to my husband if in any way that is detrimental to my children or my children feel that they are not willing to have their father in their home, there is no questions — no ifs, ands, or buts about it — my husband will not be in the home. [¶] My children — this time I have learned to listen to my children first and not to go with my heart. I've listen[ed] to my children. So whatever it is, my children will help me to decide to deal with that, is what we will do."

Mother testified that during the six years she had been with father, there were less than five incidents of domestic violence and father had never been the aggressor. Mother admitted the last incident was scary and she knew if she did not stop the cycle now, it would go further. Mother knew both she and father needed help because of their

backgrounds and how they were raised. While this was hard on her, she felt it was a blessing because it had gotten them the help they needed to be better parents whether together or not. Mother admitted past marijuana use and said she last used on June 18 or 19. Mother had not been drug tested since August 31. Mother testified she wanted to see the girls returned to her that day.

Father's attorney made an offer of proof that father would testify he: (1) had been testing clean consistently; (2) completed eight weeks of the 52-week domestic violence counseling; (3) attended seven out of ten parenting classes; (4) was eager to have the girls returned to mother; and (5) would follow whatever orders the court may give regarding staying away from mother or the girls' safety. Mother's attorney requested the court consider family maintenance because (1) while mother tested positive for marijuana, the levels were low and decreasing, which indicated no further use, (2) mother had been cooperative with the Department by getting into the classes as soon as she could, and (3) the Department had not shown a real risk to the girls if returned to her.

The court responded that it heard mother say that if the girls wanted father back home, she would listen to the girls and bring him back home. The court asked what would happen if the girls wanted him back home. Mother's attorney responded that she thought mother would follow the court's orders and mother did not intend to let father back in the home at this time. Mother's attorney explained the parents want to work on their relationship and reconcile, and she understood mother to say she would not let father back in at this time, because they're separated, and she would not let him back in the home until they reconcile their issues and the children are comfortable with it. Mother's attorney stated that mother was still going to her classes and father, who was living at the rescue mission, needed to complete his 52-week class, and she didn't think mother would put her children at risk now because she's hoping to save her marriage and eventually reconcile with father.

The girls' attorney applauded the parents on their efforts, but argued it was premature to return the girls in light of the evidence of substance abuse, the history of contact between mother and father dating back to 2004, and the girls' ages. The Department's attorney argued its recommendations were most appropriate due to the parents' violent history dating back four years, which involved serious physical violence, and the girls had been hurt in the course of the domestic violence or at father's hands and witnessed incidents of domestic violence. The Department's attorney further pointed out that the girls were learning to lie about father's presence in the home, that father had admitted going into rages and not remembering what happened, and the domestic violence was physically abusive, and extremely violent and emotionally damaging to the girls. Father's attorney argued there was insufficient evidence to show father had hurt the girls intentionally or that mother was continuing to use marijuana, and asked the court to grant mother's request for family maintenance.

The court stated family maintenance was premature, given the April 28 episode that seriously frightened mother and the June episode. The court pointed out that mother did not follow through with the restraining order she had gotten even though she had been in counseling since July 24. The court adjudged the girls dependents under section 300, subdivisions (b) and (j), and placed them in the Department's care and custody. The court ordered the girls removed from mother's and father's custody. The court offered reunification services to both parents, adopted the Department's case plan, and ordered the parents to comply and participate in services. The court ordered mother have two-hour supervised visits every other week and all-day unsupervised visits on the alternate weeks, and gave the Department discretion to increase or decrease the visitation dependent on her continuing to test negative, participate in her programs, and the quality of the visits. The court gave father supervised visits of two hours every other week and three hours on alternate weeks.

DISCUSSION

Mother contends the evidence was not sufficient to support the juvenile court's dispositional order removing the girls from her custody because (1) there was insufficient evidence of a substantial danger to the girls' physical health, safety, or well-being if returned home, and (2) the evidence does not show that less drastic measures would have been insufficient for the girls' protection. (§ 361, subd. (c)(1).) Specifically, she argues the evidence showed she was cooperating with the case plan and had eliminated the source of harm to the girls by making active efforts to ensure father would not be allowed into the family home, such as renewing the restraining order, putting locks on the gate, requesting a housing transfer and making an appointment to take father's name off the lease. She contends that because she had separated from father and was actively participating in services to help her understand and avoid domestic violence and address any substance abuse issues, there was no substantial danger to the girls from either domestic violence or marijuana use. She further contends there was no discussion of alternatives to removal and a reasonable alternative would have been return of the girls with her continued participation in counseling services.

When a parent challenges a dispositional finding, the question is whether substantial evidence supports the finding. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581 [although trial court makes findings by the elevated standard of clear and convincing evidence, substantial evidence test remains the standard of review on appeal].) In resolving this question, we view the evidence in the light most favorable to the trial court's determination, drawing all reasonable inferences in favor of the determination and affirm the order even if there is other evidence supporting a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

As relevant here, before the court may order a child physically removed from his or her parent, it must find by clear and convincing evidence that the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1).) A removal order is proper if it is based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136 (*Diamond H.*), overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The parent's level of denial is an appropriate factor to consider when determining the risk to the child if placed with that parent. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [denial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision].) The parent need not be dangerous and the child need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536, citing *In re B.G.* (1974) 11 Cal. 3d 679, 699.)

On these facts, we conclude substantial evidence supports the juvenile court's removal order given the history of domestic violence between mother and father, and its deleterious effect on the girls. In so concluding, we reject mother's argument that she removed all risk of harm by separating from father and beginning counseling, since the evidence shows the risk of harm to the girls lies in mother's willingness to remain in an abusive relationship at the girls' expense. Despite acknowledging her fear as a result of the April and June incidents, recognizing the violence could escalate if not addressed, and obtaining a restraining order, mother allowed father to stay at their home, thereby violating the order. While she later renewed the restraining order, by the time of the dispositional hearing she had dropped it even though she had been in domestic violence counseling for nearly two months. In addition, although mother testified that if her

relationship with father was detrimental to the children she would not allow him into the home, she also testified that she would rely on the girls' judgment in deciding whether to allow him to return. Mother had subjected the girls to domestic violence over a period of at least four years without seeking help. Mother's history of failing to protect the girls, coupled with evidence of her continuing lack of judgment, constituted sufficient evidence upon which the court could conclude the girls would be at a substantial risk of harm if returned to mother's custody.

In light of this evidence, the record supports the juvenile court's finding that reasonable alternatives to removal did not exist. As mother points out, she was participating in services. Mother, however, apparently had not gained insight into her problems, as she dropped the restraining order and instead of focusing on protecting the girls from harm, was focused on reconciling with father. Given mother's history of allowing father back into the home, the juvenile court reasonably concluded that returning the girls to mother's care would have been insufficient to protect them and removal was necessary to provide mother time to benefit from intensive services to enable her to understand the dangers domestic violence presented to the girls and the importance of protecting them from it. While mother points to other evidence that she asserts shows the girls would not be at risk of harm if returned to her care, she ignores the evidence that shows such a risk.

The cases mother relies on to support reversal, *In re David M.* (2005) 134 Cal.App.4th 822 (*David M.*) and *In re Henry V.* (2004) 119 Cal.App.4th 522 (*Henry V.*), do not compel a different result. In *David M.*, the appellate court found evidence of a parent's use of marijuana alone, without evidence to show the issue caused a risk of harm to the minors, insufficient to support jurisdiction. (*David M.*, *supra*, 134 Cal.App.4th at pp. 829-830.) In *Henry V.*, the juvenile court was reversed because the minor's injury was a single occurrence and because it was not clear the juvenile court

applied the clear and convincing standard to its dispositional findings. (*Henry V.*, *supra*, 119 Cal.App.4th at pp. 529-530.)

None of the issues problematic in *David M.* and *Henry V.* are presented by these facts. Evidence of domestic violence, both past and present, was uncontradicted, as was evidence the girls were affected physically and emotionally by it. Since mother's pattern of domestic violence supports the juvenile court's removal order, we need not address mother's contention that her substance abuse did not present a substantial risk of harm. Further, the juvenile court made its dispositional finding utilizing the correct standard of proof.

In sum, we find substantial evidence supports the juvenile court's removal order and therefore uphold the order temporarily removing the girls from mother's custody.

DISPOSITION

The juvenile court's dispositional order is affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Kane, J.